NORTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

MARIO ABATE,
And ELDA ABATE,

Plaintiffs,

-against-

CITY OF TROY, NEW YORK,
and HARRY TUTUNJIAN,

Defendants.

ELECTRONICALLY FILED

1:07-CV-1196
(GLS/RFT)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This action was commenced by Summons and Complaint alleging that the nuisance abatement provisions of the Troy Code are unconstitutional on their face, as well as in the manner in which they were applied to the Plaintiffs. Plaintiffs Elda and Mario Abate respectfully submit this Memorandum of Law in support of Plaintiffs' Motion for partial judgment as a matter of law on the issue of the constitutionality of certain provisions of the Code of the City of Troy, New York (hereinafter "the Troy Code"). Plaintiffs also submit the Affirmation of David Brickman, Esq. with Exhibits attached. All references to Exhibits hereinafter refer to those attached to this Affirmation.

STATEMENT OF RELEVANT FACTS

As the present Motion is pertaining only to the constitutionality of the provisions of the Troy Ordinance; the details of the City's enforcement of the Code provisions with the Plaintiff's will not be addressed herein.

The provisions of the Troy Code which are challenged are included in Chapter 205 of Part II of the Code of the City of Troy, New York (Ex. "A"). A copy of Chapter 205 is attached to the Affirmation of David Brickman, Esq. as Exhibit "A" but will be referenced hereinafter by "Troy Code" and the section number thereof. Specifically Article III of Chapter 205 of the Code entitled "Mayor's Powers; Assignment of Points for Offenses" is the subject of this Motion.

Article III was adopted at a Regular Meeting of the Troy City Council on June 1, 2000 (Ex. "A," "B"). The materials in support of the law included only a "Memorandum in Support," author unknown (Ex. "C"). The Ordinance was approved by eight out of nine of the City Council members (Ex. "D"). The City Council also unanimously agreed to review the Ordinance a year after its approval, specifically on May 31, 2001 (Ex. "B," "D"). The Ordinance was approved by the Mayor on June 15, 2000 (Ex. "E"). Subsequently, according to the text of the Code and Section DL-1 of the Troy Code, entitled "Disposition of Legislation," which sets forth "a chronological listing of legislation of the City of Troy adopted since the publication of the Code" (Ex. "F") the Ordinance was added to or amended on December 5, 2002, January 2, 2003, and July 3, 2003 (Ex. "A," "F"); however, the only record of amendment in the minutes of the City Council includes that which was approved as of June 10, 2003 (Ex. "G," "H"). There is no record of the promised review of the Ordinance one year from the date of its original approval (Ex. "H").

The findings underlying the Ordinance are stated as follows:

> The Council finds that public nuisances exist in the City of Troy in the operation of certain establishments and the use and occupation of property in flagrant and persistent violation of state and local laws and ordinances, which nuisances substantially and seriously interfere with the interest of the public in enhancing the quality of life and community environment in the City, and in fostering and facilitating commerce, maintaining and improving property values, and in preserving and protecting the public health, safety, and welfare. The Council further finds that the persistence of such activities and violations is detrimental to the health, safety, and welfare of the people of the City of Troy and of the businesses thereof and the visitors thereto. It is the purpose of the Council to authorize and empower the Mayor to impose sanctions and penalties for such public nuisances, and such powers of the Mayor may be exercised either in conjunction with, or apart from, the powers contained in other laws without prejudice to the use of procedures and remedies available under such other laws. The Council further finds that the sanctions and penalties that may be imposed by the Mayor pursuant to this law constitute an additional and appropriate method of law enforcement in response to the proliferation of the above-described public nuisances. The sanctions and penalties are reasonable and necessary in order to protect the health and safety of the people of the City and to promote the general welfare.

Troy Code § 205-17.

Article III establishes a point system for establishing nuisances in the City of Troy. The Ordinance groups and assigns points to various violations of the Penal Law, Alcoholic Beverage

Control Law, Vehicle and Traffic Law, Tax Law, Social Services Law, Agriculture and Markets Law, or provisions of the Troy Code. Troy Code § 205-19.

The points are assigned for violations that occur by the conduct or omissions of any person on or around the premises, and not the property owner. Troy Code § 205-18. The violations occur during "incidents," which the Code defines as "the execution of an enforcement action." Troy Code § 205-18. The alleged violations need not have resulted in convictions and the City is held only to the reduced burden of proving the violation by a preponderance of the evidence. Troy Code. § 205-20. The owner of the premises who is affected by the point system is not allowed a defense of lack of knowledge although the buildings targeted by the Ordinance are for the most part businesses which are open to the public. Troy Code § 205-25.

As a result of an accumulation of a certain number of "points" under this Ordinance, the Mayor is then empowered to order closure of the building or otherwise affect the licenses or permissions possessed by the owners of the targeted premises. Troy Code § 205-21. If the Mayor arbitrarily determines that closure is warranted, the Mayor has unfettered discretion in determining the length of the closure up to a year. Troy Code § 205-26(C). To the extent that the owner may establish that the alleged "nuisance" has been addressed by the owner, the Mayor may, but is not required to, vacate any Order of closure. Troy Code § 205-26(C).

The owner, lessor, lessee, and/or mortgagee of the building are entitled to some notice of the Mayor's intentions under the Ordinance and an opportunity for a hearing is provided for. Troy Code §§ 205-22 and -23. There is no description in the Code as to the rules of evidence or before whom the hearing will be held. There is no conferring of a right of confrontation; the City may prove its entire case based entirely on hearsay testimony. The owner has no power to subpoena witnesses. There is no provision for judicial review of any determination arising from the hearing.

If the Mayor issues an Order, the Order must be posted on the building and mailed to the owner and five days after such posting, the Police Department is permitted to enforce the Order. Troy Code § 205-26(A)–(B).

Within Part II of Chapter 205 of the Troy Code, the City of Troy has three different Ordinances which authorize the City to declare a property a nuisance: "Article I, Health Nuisances," "Article II, Abatement by Commissioner of Public Works," and "Article III, Mayor's Powers; Assignment of Points for Offenses." Article I focuses on nuisances created by unsanitary conditions or unmaintained buildings. Troy Code Art. I. Article II focuses on nuisances that are alleged based on crimes committed or arrests effected on targeted premises. Troy Code Art. II. Article III covers both areas of nuisance described in Article I and II.

Article III mirrors Article II to such an extent that some of the language employed is almost identical. Article II of the Troy Code, adopted only ten years ago in 1997, defines "Public Nuisance" as:

> Any building, structure, place or premises, apartment or dwelling unit where violations of certain of the provisions of Articles 220, 221 or 230 of the Penal Law are occurring and where two or more violations of the Penal Law have resulted in two or more criminal arrests within the twelve-month period of time immediately prior to the commencement of a proceeding pursuant to § 205-14; or where two or more violations of the Penal Law have resulted in two or more criminal convictions within the thirty-six-month period immediately prior to the commencement of the proceeding pursuant to § 205-14. It shall be prima facie evidence that violations are occurring where an arrest for a violation of said sections has been made within 30 days prior to the issuance of notice pursuant to § 205-14.

Troy Code § 205-13.

This definition of Public Nuisance does not utilize Article III's "point system" to label the nuisance. Article II requires notice to the owner requesting that the owner abate the alleged nuisance and warning the owner that failure to do so could result in padlocking of the building. Troy Code § 205-14(B). Under Article II, the owner then has thirty days to abate the nuisance himself without further order from the Commissioner. Then, even if the owner has not yet abated the nuisance, the Commissioner would consider steps taken in good faith by the owner or any person towards that end and could choose not to issue an order of closure. Troy Code § 205-14(C)(3). This is in contrast to the provisions of Article III which do not provide for the owner's own abatement efforts after being notified of the City's concerns about his property. Also in contrast to Article III, Article II specifically provides for judicial review of any order. Troy Code § 205-16.

In addition to this enforcement mechanism, the businesses subjected to this Ordinance are also monitored and regulated by the City's Building and Code Departments, the City's Police Department, and the State Liquor Authority, in addition to other and further agencies depending on the business of the targeted premise.

ARGUMENT

The United State Supreme Court did address very early on, the limits of the Police Power:

> To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

"A challenge to the constitutional validity of a local ordinance presents a question of law." *Deegan v. City of Ithaca*, 444 F.3d 135, 141 (2d Cir. 2006).

Plaintiff challenges the Troy Code nuisance provisions as being irrational and unduly oppressive and thus violative of various constitutional guarantees. The following reasons support this claim: (I) the Troy Nuisance Ordinance deprives business owners of their right to their property and to conduct their legitimate business by defining "nuisance" in an arbitrary and irrational manner and by adopting such definition without due deliberation; (II) the Troy Nuisance Ordinance deprives business and property owners of their procedural due process rights by failing to provide for a fair and unbiased adjudicator, by omitting any requirement of judicial review, by omitting any requirement of an independent inquiry into the culpability of the owners' conduct, and by requiring a much reduced burden of proof by failing to mandate evidence of conviction and/or by creating a conclusive presumption that all premises upon which convictions have occurred are a nuisance; (3) the Ordinance effects an unconstitutional taking of property without compensation because it deprives the owner of any economically beneficial use of the land; (4) the Ordinance is preempted by New York state law's definition of a public nuisance and exceeds the scope of that definition by arbitrarily defining "nuisance" through assignment of points to different violations of laws or regulations; (5) the penalties of the Ordinance violate the Eighth Amendment's prohibition against excessive fines; and (6) the closure of businesses and/or properties pursuant to the provisions of the Ordinance effect an unlawful seizure of property.

Point I **THE ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS RIGHTS OF TROY BUSINESS AND PROEPRTY OWNERS.**

"The Fourteenth Amendment prohibits a state from depriving 'any person of life, liberty, or property, without due process of law.' Thus it has long been clear that where a government affects the private interest of an individual, it may not proceed arbitrarily, but must observe due process of law." *Madera v. Bd. of Educ. of City of New York*, 386 F.2d 778, 783 (2d Cir. 1967) (quoting *Wynehamer v. Peopole*, 13 N.Y. 378 (1856)); *see also Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 725 F.2d 843, 849 (2d Cir. 1984).

A government may not arbitrarily infringe on the liberty and property interests of its citizens. *Dwen v.* Barry, 483 F.2d 1126, 1130 (2d Cir. 1973). Any restriction on such rights must be justified by a legitimate state interest reasonably related to the Ordinance. *Dwen*, 483 F.2d at 1130. The law at issue may not be "'unreasonable, arbitrary, or capricious, and … the means selected [must] have a real and substantial relation to the object south to be attained.'" *No. Am. Co. v. Secs. & Exchange Comm'n*, 133 F.2d 148 (2d Cir. 1943) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)). Since it is often held that preserving and protecting the public health, safety, and welfare of the public is an important governmental interest, the discussion below will focus on the interests infringed by the Troy Ordinance and the extent to which the means of the Ordinance are arbitrary, unnecessary and unrelated to the goal of protecting the public.

A. Protected Property and Liberty Interests are at Issue

"The first question of law in any due process inquiry is whether the plaintiff has a constitutionally protected interest." *DeMichele v. Greenburgh Cent. Schl. Dist. No. 7*, 167 F.3d 784, 789 (2d Cir. 1999); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("Substantive due process' analysis must begin with a careful description of the asserted right."). Here, the regulation deprives business and property owners of their interests their properties and in pursuing their chosen trades or businesses.

Although one does not have a fundamental right to conduct business in a manner that creates, maintains or constitutes a nuisance; such argument would assume that which must be proved. A business owner undoubtedly has a liberty and property interest in engaging in lawful business and in avoiding the monetary and reputational consequences imposed by the Ordinance. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (noting that the Due Process Clause does encompass the right "to engage in any of the common occupations of life"); *see also Cambell v. City of New York*, 101 F. Supp. 2d 248, 252 (S.D.N.Y. 2000). The Troy Ordinance has the effect of preventing business owners from pursuing their occupations due to the acts of others or even because of the location in which their business is situated.

Additionally, because the Ordinance may compel the closure of the business, and not simply aspects of the business which may be the source of the City's concern, the Ordinance deprives the owner of all beneficial use of his or her property. Principles of due process apply because the Ordinance affects substantial property interests. The Supreme Court has determined that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due protection." *Connecticut v. Doehr,* 501 U.S. 1, 12 (1991). The ability to effect complete closure of the business and property, therefore, must certainly warrant such protection.

The alternative abatement options of the Mayor under the Ordinance affect the occupancy certificates and/or occupational licenses of the business owners. These penalties also deprive the targeted owners of their protected property interests. Once a license or permit to engage in some activity regulated by the State is issued by a State, it is a property right that cannot be denied without adequate due process. *Bell v. Burson,* 402 U.S. 535 (1971).

B. The Ordinance is Not Rationally Related to a Legitimate Government Interest

There is no reasonable relationship between the "point system" and the occurrence of "incidents" in the vicinity of a premise and one's ability to lawfully operate a business. There mere fact that there have occurred incidents in, say, a deteriorated neighborhood in which the targeted business or property is located, does not support a reasonable inference that the business or property would be operated in an unlawful manner. *See Pentco, Inc. v. Moody*, 474 F. Supp. 1001, 1005 (D.C. Ohio 1978).

Furthermore, the violations listed in the Ordinance's point scheme are not limited to conduct or crimes which are rationally related to the purported social evils which the City claims are so important. *See MDM Restaurants, Inc. v. City of Dearborn*, No. 04-CV-73877-DT, 04-CV-73900-DT, 2005 WL 3334801, at *9 (E.D. Mich., Dec. 8, 2005) While some convictions may support such an inference, mere "incidents" and violations of the type encompassed by the ordinance, including littering and minor building code infractions, do not. "Not all prohibitable conduct is necessarily related to a State's legitimate interest in regulating or licensing a particular occupation." *Lee v. City of Newport*, No. 91-5158, 1991 WL 227750, at *7 (6th Cir., Nov. 5, 1991). Compile this overbreadth with the fact that the Ordinance does not require a conviction and that it is not even required that the conduct occur at the premises, *see MDM Restaurants, Inc.*, 2005 WL 3334801, at *9 n.4, and the Ordinance creates the likely ability that the Mayor of Troy could shut down half the City.

The implication of the Ordinance's scope is that businesses and building in Troy have become fronts for all sorts of illegal activity. Even if this is true, there must be a higher standard of proof to sustain such a suspicion so that innocent business and property owners are not unduly punished by the excessively broad scope of the Ordinance. One could only begin to imagine the scenarios which could be covered by the Ordinance: a premise which includes rental units leases a unit to a couple in marital discord and the police are called—according to the Ordinance this would be an "incident" to be held against the property owner; a premise which operates a business that serves alcohol has some unruly customers who are turned away and cause disruption on the street outside the business and the police are called—again, this could be labeled an "incident"; the final draw causing the building to be padlocked would be when the garbage is taken to the curb an hour before the City permits—another "incident" and the building is shut down. The Ordinance sorely fails in terms of its relation to the governmental interest meant to be served.

The relationship between the ends and the means can also be analyzed by looking at the legislative history of the Ordinance. Here, however, the legislative history is bare. There were no studies conducted or options weighed. The only material in support of the Ordinance is a memorandum, author unknown. The Council seemingly spent so little time considering this Ordinance that, although it was passed, there was a unanimous vote that the Ordinance be "reviewed" a year from its enactment. It is the duty of the legislative bodies to give due consideration to each and every enactment *before* it is passed. Furthermore, there is absolutely no record that any such "review" was ever conducted a year from its enactment. Such ill contemplated legislation should not be permitted to stand and deprive citizens of their rights and interests.

Under the Troy nuisance Ordinance, it is the offensive use of the property, not the property itself, which constitutes the nuisance. Because a business such as a night club or bar is not a nuisance per se, the scope of the nuisance remedy ought never to go beyond the necessities of the case and should be directed and confined to the elimination of the nuisance by way of limited injunctive relief prohibiting the unlawful use of the property. The City's interest in abating a so-called nuisance cannot be pursued by means infringing personal liberties when less restrictive alternatives are available. "Reasonable notice must be given, wherever possible, … to provide a landlord, or other party, opportunity to abate the nuisance not created by him or of which he may not have, and could not have, actual notice by reason of control or operation, in a manner causing the least disruption to the premises and minimizing the costs which he must bear ultimately." *300 West 154th Realty Co. v. Dep't of Bldgs. of City of New York*, 26 N.Y.2d 538, 543 (1970).

In addition, because the City already had several mechanisms to achieve the goals set forth in the Ordinance, the Council could not reasonably have concluded that the Nuisance Ordinance was necessary. It does not serve the interests of the public to make it easier to deprive business owners of their property and livelihood when, if there truly is a problem at the establishment, there are less intrusive mechanisms for enforcement already in place. For example, Article II of the Troy Code discussed in the statement of facts above already provided the City with an adequate means of addressing the concerns of the City. In addition enforcement of the rules and regulations of the City's Building and Code Department, the City's Police Department, and the New York State Liquor Authority are adequate to monitor and enforce the violations with which the City is concerned.

Point II THE ORDINANCE VIOLATES PROCEDURAL DUE PROCESS RIGHTS OF TROY BUSINESS AND PROEPRTY OWNERS.

The Ordinance violates the rights of Troy business and property owners to procedural due process, secured by the Fourteenth Amendment to the United States Constitution, which reads, in pertinent part, as follows: "No State may ... deprive any person of life, liberty, or property, without due process of law...." U.S. Const. Amend. XIV; *see Mathews v. Eldridge,* 424 U.S. 319, 332–33 (1976). Procedural due process demands that before a citizen can be deprived of a property interest, that citizen must given notice and a meaningful opportunity to be heard. *Roth,* 408 U.S. 564 (1972).

A. No Meaningful Opportunity to Be Heard

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies assigned to adjudicate claims. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. at 136).

The hearing "procedures" provided for pursuant to the Troy Nuisance Ordinance are unconstitutional because the hearing officer is not identified and could be assigned by the Mayor at his whim and with bias and partiality. It is impossible to gauge the probability of unfairness if there is no notice of the agency or identity of the adjudicator. At the very least, the Ordinance should give notice to those subject to its provisions of the identity of the agency who will be adjudicating the charged violations.

B. Lack of Knowledge Requirement or Defense

Section 202-25 of the Troy Code, rejecting as a defense the lack of knowledge of the owner of premises of the prohibited conduct on the property creates in essence a presumption of knowledge or eliminates all together any knowledge requirement, thereby making the offense one of strict liability. Under the Ordinance, even if there are six degrees of separation between the property owner and the wrongdoer, the property owner will still lose because her innocence is not a recognized defense. This derivative liability violates Constitutional due process. This Ordinance fails to meet even a minimal test of rationality because it extends its application to innocent owners not in privity with the wrongdoer and thus causes a burden to fall on the shoulders of the least culpable party. In constructing innovative solutions, legislators must not ensnare those who lack culpability and whose lack of privity prevents them from establishing safeguards to ensure the lawful use of their property.

The Supreme Court has said of presumptions: "Procedure by presumption is always cheaper and easier than individualized determination. But, when … the procedure forecloses the determinative issues …, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of …" those individuals affected by the presumption. *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972). In order for such a presumption to be constitutional, it must be shown that there is a rational connection between the fact proved and the ultimate fact presumed so that the inference of the one from proof of the other is not unreasonable and arbitrary.

There is no rational connection in the Troy Code between the fact proved (ownership of the premises) and the fact presumed (maintenance of a nuisance). A scienter requirement on the part of the owner of the business is crucial to a finding of the ordinance's constitutionality. *See Hvamstad v. Suhler*, 915 F.2d 1218, 1219 (8th Cir. 1990); *Lee v. City of Newport*, No. 91-5158, 1991 WL 227750, at *4 (6th Cir., Nov. 5, 1991); *832 Corp. v. Gloucester Tp.*, 404 F.Supp.2d 614, 630 (D. N.J. 2005).

The Troy Code's elimination of the owner's knowledge as an element of the City's proof, in conjunction with the presumption employed as to proof of nuisance by convictions, discussed below, essentially eliminates the City's burden in toto and completely removes the possibility of a defense for the owner. As to the City's burden of production on the owner's knowledge, the Troy Ordinance completely removes any such requirement, and in this way is distinguishable from ordinances such as that of the New York City Administrative Code discussed in *City of New York ex. rel. People v. Taliaferrow*, 144 Misc.2d 649 (N.Y. Sup. Ct., Kings County 1989) and the New York Public Health Law § 2324(3)(c). The New York City Administrative Code requires a showing "'that defendant has intentionally conducted, maintained or permitted a public nuisance'" by at the very least production of evidence "of the general reputation of the building, or of the inmates or occupants thereof …." *Taliaferrow*, 144 Misc.2d at 653. Evidence of reputation would at least create some sort of basis in proof from which to impute knowledge to the owner or at least establish negligence of the owner for failure to know. This is contrary to a bare presumption arising simply from the fact of ownership alone.

The precise type of ordinance as at issue in the present case has never been tested by challenge in the courts; however, the courts have had opportunity to analyze nuisance abatement laws which defined nuisance by a certain number of convictions, without the point system employed by the City of Troy. The Eighth Circuit considered a nuisance abatement law of Minnesota specifically targeted at prostitution convictions, which defined a nuisance as "three or more misdemeanor convictions or two or more convictions, of which at least one is a gross misdemeanor or felony, within the previous two years for: (1) acts of prostitution or prostitution related offenses committed within the building…." *Hvamstad*, 915 F.2d at 1219 (quoting Minn. Stat. Ann. § 617.81). The Court upheld the law against constitutional challenge on due process grounds but noted that "[i]f the statute permitted abatement on evidence of a single conviction with no opportunity for the property owner to deny the underlying act or first to eliminate the illegal act himself, the law would likely neither be reasonable nor constitutional." *Id.* Thus, the deciding factor for the court was the provision in the Minnesota law which gave the property owner notice of the convictions *as they occurred*, which was intended to "encourage property owners to abate the basis for the nuisance themselves …." *Id.*

The Sixth Circuit also found the owner's knowledge of the criminal incidents dispositive on the issue of constitutionality of a Kentucky Ordinance that affected the occupational license of a business or property owner if the licensee or one of his employees was once convicted of a crime that occurred on the premises. *Lee*, 1991 WL 227750, at *1. The court "concluded that the issue concerning her lack of knowledge of the acts of prostitution that occurred on the premises is determinative. The effect of the ordinance is either to create a presumption of knowledge or to eliminate any requirement of knowledge on the part of the licensee or operator…" of the illegal conduct. *Id.* at *4. The court specifically distinguished the Eighth Circuit case of *Hvamstad*, finding the knowledge requirement in the Minnesota law to have been its saving grace. *Id.* at *7.

Distinguishable from the Minnesota abatement scheme upheld by the Eighth Circuit is the Troy Ordinance, which not only does not give the owner notice of the convictions as they occur, but completely forecloses the owner's lack of knowledge as a defense. Troy Code § 205-25. Thereby, the Troy Ordinance does not facilitate the same goals as the Minnesota law—that is, without knowledge, the Troy owners have no opportunity to eliminate the illegal act himself. The only provision for the owner's abatement in the Troy Ordinance is the discretionary option of the Mayor or his designee to consider, if he so chooses, a submission of proof on abatement, along with the owner's filing of a bond. Troy Code § 205-26(C).

C. Evidence of Conviction

Also problematic in the Troy Code is the fact that conviction of the alleged violations is not required and on the flip side that conviction of the violation creates a rebuttable presumption.

The court in *Hvamstad*, analyzing the Minnesota abatement law, further noted in footnote that the Minnesota scheme required *conviction*, thus requiring proof of the offensive acts "beyond a reasonable doubt or by guilty pleas." *Hvamstad*, 915 F.2d at 1219 n. 4. Also contrary to the Minnesota law is the fact that the Troy Ordinance does not require convictions and thus proof beyond a reasonable doubt of the offensive acts in order to sustain the finding of nuisance. On the contrary, the Troy Code permits a finding of nuisance simply upon a showing by a preponderance of the evidence that a violation occurred. Troy Code § 205-20. Such a reduced burden allows the City to pursue the very drastic abatement measures permitted in the Code after a few police responses (or what the Code describes as an "incident," which is the "execution of an enforcement action") to the premises that may not have even resulted in prosecution of any person for a crime.

Even if the Ordinance required convictions, the use of an irrebutable presumption with regard to convictions is also fatal to the Ordinance on a procedural due process challenge. The law's disfavor for presumptions is discussed above and we return again to this "short cut" in the Troy's creation of a presumption of nuisance if there are convictions of the conduct included in the Ordinance. The presumption avoids the determinative issue, or what should be the determinative issue; that is, whether or not the owner of the property allowed or permitted a nuisance to be maintained on the premises.

Point III **THE ORDINANCE CONSTITUTES AN UNCONSTITUTIONAL TAKING BECAUSE IT DEPRIVES OWNERS OF ALL ECONOMICALLY VIABLE USE OF THEIR LAND.**

Where a land-use regulation effects a facial taking, it must be shown that the "language of the regulation 'denies the owner of essentially all economically viable use of his land.'" *Kittay v. Giuliani*, 112 F.Supp.2d 342, 350 (S.D.N.Y. 2000) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295–96 (1981)); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."). Allowing a regulation such as the Troy Nuisance Ordinance to mandate closure of properties and businesses upon finding of a nuisance permits the City to circumvent compensation consistent with the Fifth Amendment's command that "private property [shall not] be taken for public use without just compensation. U.S. Const. Amend. V.

Here, the penalties provided for the in Ordinance, and specifically the provisions which allow for complete closure of the offending property, rob the targeted owners of all economically viable use of their properties. The building is padlocked. The owner is unable to make use of the building for some occupation other than bar or restaurant, as in the present case. The owner is not even permitted to enter the building in order to make improvements such that the owner may potentially sell the premises at market value or above.

Justice Souter, dissenting in the case of *Lucas*, 505 U.S. at 1077, commented on the issue of takings in the context of nuisance abatement:

> The nature of nuisance law … indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to

> a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed and the remedies for such conduct usually leave the property owner with other reasonable uses of his property.

Id. at 1077 (Souter, J. dissenting) (citations omitted). Contrary to Justice Souter's observation, the extreme remedy provided for in the Troy Ordinance, closure of the business, does rob the owner of all use of the property. The Ordinance goes much further than damages, injunction, abatement, or criminal prosecution as mentioned by Justice Souter. *Id.* Also contrary to Justice Souter's observations, the Troy Ordinance does, in effect, target the building and not the conduct. That is, if the owner of the building is not even aware of the offensive conduct, as discussed *supra* Point II.B., then the nuisance abatement is more in the way of an *in rem* action, focusing on the building itself.

The means used to reach the public interest objectives must not impose limitations that do not "inhere in the title itself" or in other words, the Ordinance may not impose limitations in addition to those which the law of "nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. Thus, the Ordinance must not produce a result that exceeds "the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Id.*

Point IV THE ORDINANCE IS PREEMPTED BY THE STATE LAW DEFINITION OF NUISANCE.

The City cannot by Ordinance provide a nuisance cause of action that differs from that available under state law or alter the evidentiary burden for establishing a nuisance. *See* N.Y. Const. Art. IX, § 2(c); N.Y. Municipal Home Rule Law § 10(1). Where a particular thing is denounced by a municipality as a nuisance, the ordinance should provide for an investigation as to the fact whether or not it is a nuisance and may not declare by arbitrary definition a nuisance that which is not. *See City of Albany v. Newhof*, 230 A.D. 687, 693 (3d Dep't 1930) (Davis, J. dissenting) ("A lawful business does not become unlawful by the arbitrary fiat of a municipal legislative body acting under general delegated powers.")

Although the City is authorized by state law to establish a *procedure* for the abatement of a nuisance and are afforded general authority to declare what constitutes a nuisance, such authority is limited by the traditional definition and understanding of "nuisance" under state law.[1] *See Lucas*, 505 U.S. at 1029; *John R. Sand & Gravel Co. v. U.S.*, 60 Fed. Cl. 230, 249 (2004). A city cannot by mere declaration make a specified property a nuisance when it is in fact not. A nuisance action and abatement remedy are prohibited except where the objectionable activity can be brought within the terms of the statutory or common law definition of public nuisance. This lawmaking supremacy serves as a brake on any tendency to punish conduct or take control of property through a standardless notion of what constitutes a nuisance.

Under state nuisance law, property is not a public nuisance merely because it was instrumental in the commission of a public offense. A nuisance exists only if the property is *habitually* used for illegal purposes. Nuisance theories may not be used like a light beam to render business or property owners liable in nuisance for crimes perpetrated by others on or around the property.

Also, under New York law, "[s]atisfaction of the causation requirement for liability in public nuisance actions requires proof that a defendant, alone or with others, created, contributed

[1] In New York, a nuisance is defined as follows: "A public nuisance under New York law as it is understood today 'consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.'" *N.A.A.C.P. v. AcuSport, Inc.*, 271 F.Supp.2d 435, 482 (E.D.N.Y. 2003) (quoting *Copart Indus., Inc. v. Consol. Edison Co.*, 41 N.Y.2d 564, 568 (1977)).

to, or maintained the alleged interference with the public right." *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 281 (E.D.N.Y. 2004). The Troy ordinance does away with any necessity of causation and requires no real proof before its drastic remedies may be employed.

The Ordinance attempts to declare the targeted businesses nuisances per se by omitting any scienter requirement. Under New York law, a per se nuisance is a use "in its inherent nature is so hazardous as to make the danger [of] extreme and serious injury so probable as to be almost a certainty." *See Melker v. New York*, 28 Bedell 481, 489 (N.Y. 1908). The requirements of proof in such a case have been described as follows:

> Nuisance per se is a nuisance based on an act which is unlawful, even if performed with due care…. [T]he plaintiffs need only establish a violation of law, and need not show that the nuisance was intentional or negligent. They must still, however, establish the remaining elements of the cause of action, which include proof of a situation created by the defendants which endangers or injures the property, health, safety, or comfort of a considerable number of persons.

State v. Fermenta ASC Corp., 238 A.D.2d 400 (2d Dep't 1997).

The Troy Ordinance fails to even meet the lax standards of proof for nuisance per se because of the many presumptions discussed, *supra* Point II, including the lack of a scienter requirement for the owner. In addition, the occurrence of "incidents" at a property which may be criminal as against third parties or simply regulatory in the way of building code violations, patently does not rise to the extreme level of a nuisance per se.

Point V THE ORDINANCE VIOLATES THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE.

The purpose of the Troy Ordinance is to empower the Mayor "to impose sanction and penalties." Troy Code § 205-17. Thus, the Ordinance has more than simply a remedial purpose, but rather, by its very description, the Ordinance has a punitive goal. The punitive goal causes the Ordinance to be subject to the limits of the Eighth Amendment's prohibition against excessive fines. *Bennis v. Michigan*, 516 U.S. 442, 451 (1996).

In *Bennis*, Justice Rehnquist, writing for the majority, noted that a statute which did not separate "co-owners who are complicit in the wrongful use of property from innocent co-owners" might be unconstitutional. *Bennis*, 516 U.S. at 453. The statute in *Bennis*, however, allowed a *trial court* discretion to off-set the loss suffered by an innocent co-owner and that *equitable discretion* saved the Michigan statute; without it, the statute would have violated long-standing principles of substantive due process. *Id.*

The equitable nature of the proceeding in Bermis also was crucial to Justice Ginsburg's decision to join in the majority's opinion.

> I join the opinion of the Court and highlight features of the case key to my judgment.... [It] was 'critical' to the judgment of the Michigan Supreme Court that the nuisance abatement proceeding is an 'equitable action.' That means the State's Supreme Court stands ready to police exorbitant applications of the statute.

Id. at 457 (Ginsburg, J. concurring).

The Troy Ordinance provides no such protection. The Ordinance does away with any potential offset for the owner; the Mayor is granted the only discretion; not even the hearing officer is given any flexibility; and finally, the Ordinance fails to provide for any judicial review of the determinations of the hearing officer. As discussed further throughout this Memorandum, the penalties in the Troy Ordinance are extreme and the procedures provided do not stand up to save the provisions from constitutional defect.

Point VI THE ORDINANCE EFFECTS A SEIZURE OF PROPERTY

"A 'seizure' of property ... occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Soldal v. Cook County,* 506 U.S. 56, 61

(1992) (quoting *United States v. Jacobsen,* 466 U.S. 109, 113 (1984)). The Fourth "Amendment's protection applies in the civil context," and is not confined to "seizures that are the outcome of a search," *Soldal*, 506 U.S. at 67–68.

"Whether the Amendment was in fact violated … requires determining if the seizure was reasonable." *Id.* at 61–62. "[T]he reasonableness determination will reflect a 'careful balancing of governmental and private interests.'" *Id.* at 71 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

Given the substantive due process discussion, *supra* Point I, as to the interests of the government and business and property owners, enforcement of the Ordinance must be found to cause an unlawful seizure.

CONCLUSION

For all of the above reasons, the Troy Nuisance Ordinance should be declared unconstitutional on its face in addition to such other and further relief as the court finds just.

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Respectfully submitted,

/S/

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